APPENDIX

In The Supreme Court Of The United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI, *Petitioner*

v.

DANIEL ACKERMAN, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF PENNSYLVANIA, WESTERN DISTRICT

PETITION FOR CERTIORARI FILED
JANUARY 2, 1979
CERTIORARI GRANTED
FEBRUARY 21, 1979

APPENDIX

In The Supreme Court Of The United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI, *Petitioner*

v.

DANIEL ACKERMAN, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF PENNSYLVANIA, WESTERN DISTRICT

PETITION FOR CERTIORARI FILED
JANUARY 2, 1979
CERTIORARI GRANTED
FEBRUARY 21, 1979

INDEX

	Page
Docket Sheet (Westmoreland County Court of Common Pleas)	1
Plaintiff's Original Complaint, Filed March 4, 1976	6
Letter of Lorraine Ferri, Filed February 26, 1976	23
Defendant's Preliminary Objections, Filed March 25, 1976	24
Plaintiff's First Amended Complaint, Filed April 2, 1976	28
Plaintiff's "Traversal Brief" (and exhibits thereto), Filed October 18, 1976	30
Judgment Order of the United States Court of Appeals for the Third Circuit in *The United States v. Ferri*, Filed November 3, 1976	38
Opinion of the Court of Common Pleas, Westmoreland County, Filed January 31, 1977	41
Order of the Pennsylvania Superior Court, Filed February 15, 1978	46
Opinion of the Pennsylvania Supreme Court, Filed November 18, 1978	48
Judgment of the Pennsylvania Supreme Court, Filed November 18, 1978	56
Order of the United States Supreme Court Granting Petition for Certiorari and Leave to Proceed *In Forma Pauperis*, Filed February 21, 1979	59

DOCKET SHEET (WESTMORELAND COUNTY)

(For self)
Francis Rick Ferri, and
Constance Jean Ferri,
and
Luigi Ferri &
Concetta Ferri
and related parties
whom vested interest
may appear

2633 vs
(Nakles-Schumacher)
Daniel Ackerman,
Esquire

Tax & Fee Atty	
Nakles	$25.00
Atty	3.00
Pro Sukala Atty	
Nakles	25.00
Pro Sukala 5-16-77	20.00

Certification of Docket Entries and all original papers filed in Negligence Action from Union County, Pennsylvania at No. 115 1976 and transferred to Westmoreland County, Pennsylvania by virtue of the following Order: AND NOW, this 20th day of August, 1976, the defendant's preliminary objections are sustained, and the Prothonotary is ordered to transfer this cause of action to the Court of Common Pleas of Westmoreland County upon the plaintiff's paying the costs. BY THE COURT: A. Thomas Wilson, P.J. Eodie: Complaint in Negligence filed in Union County March 4, 1976; Affidavit of Service and Affidavit to proceed In Forma Pauperis filed in Union County March 4, 1976; Praecipe for Appearance filed in Union County March 25, 1976; Preliminary Objections and Petition Raising Question in Venue filed in Union County March 25, 1976; Plaintiffs response to Defendant's Preliminary Objections filed in Union County April 2, 1976; Preliminary Objections to Amended Complaint filed in Union County April 15, 1976; Defendant's Brief Supporting Preliminary Objections relative to Venue filed in Union County April 15, 1976; Plaintiff's Brief in Support of Respondent's Preliminary Objections to Union County as Court of Venue filed in Union County April 22, 1976; Letters concerning Exhibits filed in Union County April 30, 1976; Amended Complaint, Petition to proceed with a Jury Trial filed in Union County August 20, 1976; Opinion and Order filed in Union County August 23, 1976; Order filed in Union County August 24, 1976. Filed in Westmoreland County August 25, 1976 at 11:30 A.M.

AND NOW, August 30th, 1976, this case having been transferred to this Court from Union County by order of

President Judge A. Thomas Wilson dated August 20, 1976, and because Preliminary Objections of defendant are still pending; IT IS HEREBY ORDERED that the Court Administrator list this case on the Court En Banc Argument List for Friday, October 29, 1976; both parties have agreed in the papers filed to submit the case on briefs without oral argument. Defendant's brief shall be filed on or before September 15, 1976; the brief of Plaintiff Francis Rick Ferri shall be filed on or before October 19, 1976. The Court Administrator shall mail a copy of this Order to the parties. BY THE COURT: Richard E. McCormick, J. (Filed August 30, 1976).

October 12, 1976 Order, the Court Administrator is directed to place the case on the next available Argument List. By the Court: Richard E. McCormick, J.

November 3, 1976, Plaintiff's Interrogatories, Pursuant to Rule 4004, etc., Pa. Rules Civil Pro, filed.

November 19, 1976 Plaintiff's Interrogatories to George Schumacher, Esquire, filed.

November 19, 1976 Plaintiff's Interrogatories to The Honorable George Wallace, Governor of Alabama, filed.

November 19, 1976 Plaintiff's Interrogatories to Boron Oil Company & Its Credit Card Division, filed.

November 29, 1976, Plaintiff's Motion to the Court Requesting: Appropriate Order Compelling the Defendant to Respond to Plaintiff's Written Interrogatories, filed.

December 9, 1976 Plaintiff's Interrogatories to Police Chief Kent, Plum Borough, and Answers thereto, filed.

December 17, 1976 Plaintiff's Notice to the Court and Its Subdivisions of Required (60) Notice in Advance of ant Trial Proceedings to Plaintiff, filed.

December 23, 1976 Motion to Strike Defendant's Arguments in (2 and 3) His Motion to Dismiss the Complaint (9-15-1976), filed.

December 23, 1976 Plaintiff's Objection to Defendant's Motion for a Protective Order filed.

January 11, 1977 Defendant's Motion for Protective Order filed and the following order made: AND NOW, January 3, 1977, upon motion of Ned J. Nakles, attorney for Defendant, and for shown, IT IS HEREBY ORDERED, pursuant to Pa. R.C.P. No. 4011, that Defendant is not required to answer any Interrogatories filed by Plaintiff until the issues raised by Preliminary Objections filed by Defendant are decided by the Court en Banc. BY THE COURT: Richard E. McCormick.

January 11, 1977 Defendant's Motion for Protective Order filed and the following order made: AND NOW, January 3, 1977, upon motion of George E. Schumacher, Attorney for Defendant, and for cause shown, IT IS HEREBY ORDERED, PURSUANT TO R.C.P. No. 4011, that Defendant's counsel is not required to answer any Interrogatories filed by Plaintiff until the issues raised by Preliminary Objections filed by Defendant are decided by the Court en Banc. BY THE COURT: Richard E. McCormick, Judge.

January 12, 1977, Conditions Governing the Production of a United States Prisoner Upon a Writ of Habeas Corpus Issuing Out of a State Court, filed.

January 13, 1977, Plaintiff's Motion to the Court For an Appropriate Order Compelling the Listed Parties, Boron Oil Company, New America Film Co., and George Schumacher, to respond to the Written Interrogatories, filed.

AND NOW, to wit, this 21st day of January 1977, for the reason that this case has been previously assigned to Judge Richard E. McCormick, it is removed from the Argument List. BY THE COURT: Gilfert M. Mihalich, J. (Filed January 24, 1977).

January 31, 1977 at 11:52 A.M. Opinion and Decreee, sustaining preliminary objections in the nature of a demurrer and dismissing the original complaint as amended filed.

January 31, 1977 at 11:52 A.M. Order of Court made: AND

NOW, to wit: this 31st day of January, 1977, after due and careful consideration of the pleadings and briefs presented in this matter, it is hereby ORDERED, ADJUDGED AND DECREED that Defendant's Preliminary Objections in the nature of a Demurrer are hereby sustained, and the Original Complaint as amended is dismissed. BY THE COURT: Richard E. McCormick, Judge. CONCURRING: David H. Weiss, P.J. AND L. Alexander Sculco, Judge. Eo Die: Notice to Attorneys of Record.

AND NOW, to wit: this 27th day of January 1977, it is ORDERED AND DIRECTED that the Voluntary Non Suit filed by Plaintiff Francis Rick Ferri be hereby stricken from the record as not being in conformity with Pa. R.C.P. No. 230, which provides that a "voluntary non suit shall be the exclusive method of voluntary termination of an action, in whole or in part, by the plaintiff during the trial." BY THE COURT: Richard E. McCormick, J. (Filed January 31, 1977).

February 7, 1977, Notice of Appeal to the Superior Court of Pennsylvania, filed,

April 13, 1977, Plaintiff's Response to Defendant's Motion to Dismiss the Appeal for Failure to Docket the Appeal filed.

April 13, 1977, Second Notice of Appeal to the Superior Court of Pennsylvania, filed.

April 15, 1977, Notice of Appeal to the Superior Court of Pennsylvania at No. 676 April Term, 1977 filed.

December 18, 1978, at 1:52 P.M. Appeal from the Superior Court of Pennsylvania at No. 676 April Term, 1977, PER CURIAM: Filed: February 15, 1978, Order affirmed: AND NOW, this 15th day of February, 1978, it is ordered as follows: Order Affirmed. BY THE COURT: Irma J. Gardner, Deputy Prothonotary.

December 18, 1978, at 1:52 P.M. Order from the Supreme Court of Pennsylvania Western District at No. 98 March Term, 1978: ON CONSIDERATION WHEREOF it is not here ordered and adjudged by this Court that the Order of the Superior Court, be, and the same is hereby affirmed. BY THE COURT: Sally Mrvos, Esquire Prothonotary.

December 18, 1978, at 1:52 P.M. Opinion from the Supreme Court of Pennsylvania Western District at No. 98 March Term, 1978: The order of the Superior Court affirming the order of the trial court en banc, sustaining the demurrer and dismissing the complaint is hereby affirmed. Mr. Justice Manderino concurs in the result. Mr. Justice Roberts filed a dissenting opinion in which Mr. Justice Larsen joins.

December 18, 1978, at 1:52 P.M. Dissenting Opinion from the Supreme Court of Pennsylvania Western District at No. 98 March Term, 1978: I would, therefore, reverse the order of the Superior Court. Mr. Justice Larsen joins in this dissenting opinion.

NOTE: Although not contained in the docket sheet, it is stipulated by the parties that the plaintiff's traversal brief was filed on October 18, 1976.

IN THE COURT OF COMMON PLEAS
FOR UNION COUNTY
COMMONWEALTH OF PENNSYLVANIA

Francis Rick Ferri
United States Penitentiary
Lewisburg, Pa. 17837

&

Constance Jean Ferri
R. D. #1
Boyers, Pa. 16020

&

Luigi Ferri &
Concetta Ferri
535 Allegheny Avenue
Glassport, Pa. 15045

&

Related Parties, Whom
Vested Interests May
Appear
Plaintiffs (et al)

-v-

Mr. Daniel Ackerman,
Esquire
27 North Main Street
Greensburg, Pa. 15601
Respondant

Civil Action Law
Docket Number

no 115 1976

Jury Trial Demanded

Jurisdiction

Plaintiffs (et al) are residents of the Commonwealth of Penna. Francis Rick Ferri, Plaintiff is a resident of Union County Post Office Box 1000, Lewisburg Pa. 17837, having resided therein for the last thirty (30) months having resided in the Commonweath of Pennsylvania, for forty (40) yrs.

COMPLAINT IN NEGLIGENCE
FILED MARCH 4, 1976

Complaint of Negligence by Daniel Ackerman, Esquire, in Administrating the Defense for Plaintiff, Pursuant to Chapter 66, Articles 3391 and 3393, of The Pennsylvania Rules Of Civil Procedure. to wit:

That the Defendant, Daniel Ackerman, Esquire, being an attorney of the bar of the Commonwealth of Pennsylvania, the Plaintiff, in the Month of December 1975 appeared in Federal Court to answer a criminal indictment without counsel, the Federal Court appointed, defendant as counsel for the plaintiff, the defendant under took said appointment to defend plaintiff in said action in a skillfull and dilligent manner, as proscribed by the Pennsylvania and American Bar Association's Canons of Ethics and sworn to uphold by Defendant.

That Plaintiff had a complete defense to said action which he communicated to defendant beginning on or about December 19, 1974 continuing to April 17, 1975.

That criminal proceedings were held in Federal Court beginning on or about December 19, 1974 before Honorable Judge Rabe Marsh in indictment number 74-277 of which defendant was duly bound to interpose said defense by accepting appointment as counsel for plaintiff there-in. That said defendant failed to interpose said defense, defendant wholly neglected to do so and by reasons thereof and through his negligence, plaintiff was found guilty and sentenced to serve thirty (30) years confinement in federal prison.

STATEMENT OF FACTS

1) The Defendant is a member of the Bar, Commonwealth of Pennsylvania practicing law the entitled address.

2) On or about December 15, 1974 Defendant accepted appointment as counsel for Plaintiff in answer to a criminal indictment in Federal Court said indictment number 74-277.

3) On December 19, 1975, defendant interviewed plaintiff at the Alleghney County Prison pursuant to said appointment in item 2.

4) On December 20 and 21st, 1974, defendant wrote two (2) letters to your plaintiff stating points of law and oral communication with the trial court, Honorable Judge Rabe Marsh.

5) That beginning on or about December 15, 1974, plaintiff wrote numerious letters to defendant instructing said defendant and informing said defendant of his defense in the criminal action in federal court 74-277, said correspondence continued through to May 1975.

6) The Plaintiffs are relation(s) of Francis Rick Ferri, to wit:

   (a) Constance Jean Ferri at the time of the events in this complaint was married to plaintiff knowing full well of plaintiff then term of incarseration fully expecting to resume matramonial relations upon plaintiff's then anticipated release.

   (b) That Constance Jean Ferri has been deeply aggrieved by the imposition of an additional twenty two (22) years of sentencing confinement upon plaintiff, both mentally and financially.

   (c) That Luigi Ferri & Concetta Ferri are the parents of Francis Rick Ferri, and were fully competent to stand the pressures of plaintiff's original sentence, however the imposition of an additional twenty two (22) years upon their son has deeply aggrieved their mental state as well as financial state.

   (d) That Linda, Jeffry & Richard Ferri are the children of Francis Rick Ferri having close emotional ties to

their father of long standing and were prepared to withstand the original hardships of Francis Rick Ferri's original sentence, however upon the imposition of an additional twenty two (22) years of confinement upon their father has left them deeply aggrieved both mentally and emotionally and financially.

   (e) That Lorraine Ferri is the mother of Linda, Jeffrey & Richard Ferri being the former Mrs. Francis Rick Ferri. That Lorraine Ferri and Francis Rick Ferri although long divorced maintained a excellent relationship as to the parental guidence of their respective children. That Lorraine Ferri depended upon Francis Rick Ferri for both mental as well as financial support in raising their children. That Lorraine Ferri was prepared to withstand the hardships of Francis Rick Ferri's original term of confinement, however the imposition of twenty two (22) years of additional confinement has deeply aggrieved her both mentally and financially.

7) That a pre-trial conference was held on or about January 17, 1975 in said criminal action before Honorable Judge Rabe Marsh lasting four (4) days.

8) That a trial by jury began on or about February 17, 1975 continuing through to March 6, 1975, resulting in a guilty verdict against plaintiff.

9) That Plaintiff complained continually through-out these proceedings about defendant's failure to act in a dilligent, intelligent manner failing to interimpose said defense, that plaintiff had communicated to defendant in numerios memos, letters, petitions to the court, and motions filed in his be-half in an attempt to bring out said defense.

10) That in May 1975, defendant realizing that plaintiff had legitimite causes against defendant for negligence upon his inactions resigned as appointed counsel.

11) That Plaintiff, Francis Rick Ferri, received a sentence of thirty years (30) imposed by the Honorable Judge Rabe Marsh, as a result of the jury's verdict in criminal action 74-277, said sentence has caused irr-repairable mental, emotional and financial grieviences upon Plaintiff.

12) The complete record(s) of Criminal Number 74-277, U.S.D. Court, for the Western District of Pennsylvania, which is Plaintiff issue of negligence herein, may be located in the, "record de hors," U.S. Clerk of Courts, United States Courthouse, Pittsburgh, Pa. under the captioned docket entry.

COMPLAINT-IN-NEGLIGENCE

Plaintiff's complaint in negligence is more fully exposed in the ensuing Titles, *ISSUE A A*, *ISSUE B B*, *ISSUE C C*, and their respective numbered paragraphs.

Issue A A, Defendant's negligence in administring Plaintiff's defense at The pre-trial hearing on Janaury 17, 1975.

1) Plaintiff had written numerious letters to defendant and to the court requesting the subpeona of certain documents, witness and related criteria, begining on or about December 13, 1974 through to January 21, 1975, including the filing of several motions to dismiss portions of the indictment as well as the indictment itself.

2) Plaintiff neglected to interview one (1) witness nor to allocate one day of his schedule to prepare for the pretrial hearing on January 17, 1975.

3) The court submitted all correspondence that it had received from your Plaintiff to defendant, on or about December 18, 1974.

4) Defendant failed to subpeona Pennsylvania State Police Officer whom interviewed Plaintiff at Federal Prison in October 1974, plaintiff informed the court and defendant of this via written correspondance.

5) Defendant failed to subpeona Pennsylvania State Police Officer who also interviewed Plaintiff at Federal Prison in October 1974, plaintiff informed the court and the defendant of this via written correspondance.

6) Defendant failed to subpeona U.S. Postal Inspector also interviewed Plaintiff at Federal Prison in October 1974, Plaintiff informed the court and the defendant of this via written correspondance.

7) Defendant neglected to subpeona the, Writ of Habeas Corpus Ad Testificandum issued to transfer plaintiff from Lewisburg, Pa. Prison to the New Haven, Connecticut Prison with its accompanying affidavits and supporting memos. Plaintiff informed the court and the defendant of this via written mail.

8) Defendant neglected to subpeona the, Writ of Habeas

Corpus Ad Testificandum issued to transfer plaintiff from Lewisberg, Pa. Prison to the Alleghney County Jail in Pittsburgh, Pa. issued on or about January 4, 1974 by federal attorneys, with its accompanying affidavit and supporting memos. Plaintiff informed the court and defendant of this via written correspondance.

9) Defendant neglected to subpeona the, portion of the U.S. v Klein 515 F 2d transcript (3 cir 1975) where plaintiff was subject of a pre-trial hearing, being presented as a witness in that trial by government attorney's. Plaintiff informed the court and the defendant of this via written correspondance.

10) Defendant neglected to subpeona the, witnesses list given the defense in U.S. v Klein, supra, on January 16, 1974, listing plaintiff as a witness in the Klein, supra, trial. Plaintiff informed the court and defendant of this via written correspondance.

11) Defendant neglected to have testify attorney's Fink and Iseral despite the fact that Fink had been subpeoned and government counsel attested to conversations with Iseral concerning plaintiff, Plaintiff requested defendant to have both attorneys testify in both written and oral communications, attorneys Fink and Iseral were present at that hearing and had interviewed plaintiff at the Lewisburg, Pa. Prison in summer of 1974.

12) Defendant neglected to have subpeoned the witness list furnished by the Insurance company in a State Civil Trial where government attorneys were assisting that Insurance Co. had provided plaintiff's name as a witness for the Insurance company. That Civil trial occurring in summer of 1974, involving the destruction of an ice plant by fire, in Greensburgh, Pa.

13) Defendant failed to object when court ordered sequestration of all witnesses then ordered the defense to present it's contentions first by permitting the U.S. Attorney to testify first then remain, despite the court's order of sequestration, that U.S. Attorney, Crawford, being the government's main witness as well as chief prosecutor, whom the infractions in the petition to dismiss filed by plaintiff were the subject of the hearing.

14) Defendant neglected to object when court ordered the

expungement of the testimony of attorney Thomas Livingston a key witness for the plaintiff.

15) Defendant neglected to subpeona attorney James Ashton with his records as Ashton had represented Bertini the government's key witness against petitioner and had represented plaintiff in the prior mentioned court records in items (B B, no. 7). Plaintiff had written to the court and to defendant via correspondance on several occasions on this matter.

16) Defendant neglected to question F.B.I. agent Rogers if he referred Plaintiff's name and related data to U.S. Attorney's Office in New Haven, Connecticut, and if so why, neglected to question Rogers why he visited Plaintiff at the Lewisburg, Pa. Prison in November 1974. Plaintiff submitted to defendant a list of questions to ask F.B.I. agent Rogers.

17) Failed to have testify U.S. Magistrate Mitchell, who has offices in the same federal building, plaintiff had written to the court and defendant for Magistrates testimony.

18) Defendant neglected to have the transcript of plaintiff's arraignment hearing transposed for cross examination of government witnesses and as evidence favorable to plaintiff.

19) Defendant neglected to cross-examine government counsel Crawford on his prior testimony in Plaintiff's other cause (72-245, hearing 7/17/73) where Crawford states that the government had an airtight case in 1973, this issue being a vital factor in that pre-trial hearing. Plaintiff submitted that transcript to defendant who ignored such.

Issue B B, Defendant's negligence in advising Plaintiff on Points of Law and in failing to properly negotiate with the court a requested plea bargain, favorable to the plaintiff and a matter of court records.

1) Upon plaintiff's initial meeting with defendant a plea of guilty was discussed in accordance with prior court proceedings, subsequently defendant issued two (2) letters

to plaintiff stating somewhat the context of the meeting with points of law, occurring on or about 12/19/74.

2) Plaintiff responded to defendant's letters on or about 12/24/1974 accepting the proposal context of the letters requesting clairification of certain points of law.

3) Nothing was done in futherance of the intended guilty plea by defendant.

4) Plaintiff filed a motion attempting to bring out the issue of why endure a futile trial, win or loose plaintiff still went back to prison to complete service of present sentence, defendant neglected to act in any manner. This motion was filed on or about January 17, 1975.

5) At the hearing on January 17, 1975 the court asked plaintiff if he wished to change his plea, plaintiff responded no, and was cut off when he began to state, "no, unless certain agreements are adheered to" plaintiff then informed his counsel that he wanted counsel to call to the court's attention the letters in items (1) and (3), counsel did nothing.

6) Defendant informed plaintiff that if he testified at the pre-trial hearing on January 17, 1975, the government could introduce this testimony at the latter trial, whether plaintiff testified at the latter trial or not.

7) At the onset of trial on February 17, 1975 plaintiff instructed defendant while he was in the U.S. Marshall's holding cell in the federal courthouse that, upon commencement of the proceedings when plaintiff was present to request from the court permission to plead guilty according to prior court records and the right to preserve his pre-trial issues for appellate review if the court refused to enter a plea of nolo contendere and request the context of the letters in items (1) and (2) in open court. Plaintiff entered the court room the court stated, "you may not change your plea" plaintiff asked defendant if he had done as requested, defendant stated he had except he could not embarrass the court with those letters, and refused to do so.

Issue C C, Defendant's negligence in administering Plaintiff's defense when a complete defense was prepared and delivered to the Defendant, for trial purposes.

1) Plaintiff delivered via mail and personally list(s) of witnesses to be interviewed and subpeoned, futher delivering list(s) of documents and or records to be subpeoned, beginning from December 19, 1974 through to March 5, 1975, to Defendant, for use(s) favorable to plaintiff at trial.

2) Defendant did "not" interview one witness, for trial preparation.

3) Defendant neglected to interview Attorney Ashton, Bertini's prior attorney for impeachment purposes, futher failing to subpeona Ashton despite your Plaintiff's written request for this to the court and defendant.

4) Defendant neglected to interview Attorney Sullivan, Bertini's prior attorney for impeachment purposes, futher failing to subpeona Sullivan for trial purposes despite the fact that Sullivan was prepared to testify as he had already testified at the pre-trial hearing. Plaintiff requested this vital testimony on several occassions to Defendant.

5) Defendant neglected to interview or subpeona Attorney Thomas Kerr, Bertini's court appointed attorney, for impeachment purposes, despite the fact that plaintiff requested such on several occassions.

6) The trial court made available Bertini's trial transcript for impeachment purposes, Defendant neglected to even read such. Identical witnesses testified at the prior Bertini trial that were listed to testify at this trial 74-277, on the identical same issues.

7) Defendant neglected to have the Bertini sentencing transcript made available for direct impeachment of Bertini, neglected to subpeona such or request such from the court, despite the fact that plaintiff wrote to the court and defendant on several occassions requesting such. (sentencing transcript of Bertini's trial was an independant transcript of the trial transcript)

8) Defendant neglected to have available Bertini's prison records, neglected to subpeona such, to demonstrate Bertini's narcotic habits and crimes, Plaintiff wrote to the court and to defendant requesting such.

9) Defendant neglected to interview Bertini, who was the key witness against plaintiff, despite the fact that the government made Bertini available at the Rule 24 conference, 47 days before trial. Plaintiff submitted a list of questions to interview Bertini by counsel via written correspondence.

10) Defendant neglected to interview any-one of the witnesses furnished by the government on the cronological record, at the Rule 24, conference all of which were interviewed by the government. Plaintiff requested defendant to interview those listed witnesses for exculpatory criteria.

11) The list of possible exculpatory witnesses listed on that cronological record exceeded twenty (20).

12) Defendant neglected to interview the officers of the New America Film Company, whose offices are blocks away from the U.S. Federal Courthouse Plaintiff wrote to the court and to the defendant requesting subpeona of these witnesses and their records related to the then cause of action. Defendant neglected to subpeona such witnesses or records.

13) Plaintiff instructed defendant 60 days prior to trial to locate Attorney George Schulter, interview him and subpeona him, as his parents reside in Whitehall, Pa. a few miles from the Federal Courthouse. Defendant neglected to even attempt to locate Attorney Schulter, he wrote to Ashtons old address.

14) Defendant failed to subpeona or interview a dynimite expert despite plaintiff requests for such.

15) Defendant failed to investigate the interstate allegations of the government in the indictment, despite the fact that Plaintiff gave defendant numerious criteria to review and to futher witnesses to subpeona to contridict the interstate allegations of the indictment.

16) Defendant did not interview the three (3) witnesses that the court made available for impeachment porpuses, namely, Robert Stiver, Daniel Hill and James Jackson.

17) Defendant failed to interview Dr. Vincent Sundry, who testified for the defense, despite the fact that Sundry was in the Federal Courthouse that same day he testified.

18) Defendant neglected to question the witnesses in items 16 and 17 as to Bertini's narcotic habits, despite the fact that the government had stipulated to Bertini's narcotic smuggling, and Plaintiff delived to defendant statements from those witness who knew of Bertini's narcotic habits.

19) Defendant neglected to question Dr. Vincent Sundry as to whom he saw with Bertini at the seine of the crime, despite the fact that Plaintiff delivered to defendant a statement from Dr. Sundry, where Sundry states he observed another individual with Bertini on the night of the crime.

20) Defendant solicited from Dr. Sundry, the response from the Boiler Plate question, *"when and where was the last time you saw plaintiff"*, Dr. Sundry being under oath answered, *"in prison as Plaintiff is in jail with me"*, knowing full well the response that question would obtain and knowing full well of its damaging effects upon plaintiff's cause.

21) Defendant neglected to cross-examine Mr. Lynn Dunn, on his alledged interstate activites, a critical allegation in the indictment, for Dunn stated he displayed or demonstrated the Roger Williams Music Studios to prospective buyers on one hand then on the other hand he stated such studious were closed and non-profitable.

22) Defendant neglected to cross-examine Mr. Wagner on the same subject as in item 21, despite the fact that plaintiff submitted to defendant a list of questions to cross-examine either and both or the witnesses in item 21 and 22.

23) Defendant failed to introduce the Pa. State documents relating to the non-interstate activities of Dunn, despite the fact that plaintiff gave such to defendant.

24) Counsel defendant failed to object when government introduced a tape recording at trial despite the fact the government stated pre-trial it knows of no electronic serveilance.

25) Defendant neglected to put Bertini back on the stand at close of trial when government offered such, by doing so defendant failed to inform the jury of the massive aid

given Bertini by the government, despite plaintiff's repeated requests to do so.

26) Defendant failed to object when trial court stated "impeach on convictions only".

27) Defendant failed to ask for a directed verdict of accquittal upon close of the trial, subsequently failing to ask for dismissal of count two (2) as the government failed to prove any interstate nixus.

28) Defendant failed to ask court order the government to select one or another of the three (3) firearms counts, either pre-trial or upon close of testimony.

29) Plaintiff filed motions to dismiss on the issues in items 27 and 28 defendant failed to act in any favorable nature upon the motions.

30) Defendant neglected to question the government bomb expert from Washington D.C. Justice Department, exactly when did the government's exhibit (bomb) become a bomb under the law charged in the indictment.

31) Defendant failed to cross-examie government's dynimite expert, as to how Bertini could suffer only minor damage, when 5 sticks of dynimite went off in his hand as Bertini testified.

32) Defendant neglected to cross-examie either of the government's two (2) bomb & dynimite experts on their prior testimony in the Bertini trial and to the list of questions submitted to defendant by plaintiff.

33) Defendant neglected to subpeona State Court Judge Author Wessel, who had converted a 2 &½ year consecutive sentence to concurrent for Bertini, upon Bertini's plea of co-operation with government, plaintiff informed defendant of this and requested such.

34) Defendant failed to supeona Attorney Michel Litman, who also represented Bertini, and had obtained a exculpatory statement from Bertini while Bertini was in prison, plaintiff requested this of defendant. This criteria was also listed on the government's cronological report.

35) Defendant neglected to supeona Mr. Carmen Colograndе, who was interviewed by plaintiff's

investigator. Colograndе had exculpatory testimony favorable to plaintiff. Government had given Colograndе immunity, plaintiff requested this vital testimony in letters and orally on numerious occassions.

36) Defendant failed to have testify Mr. Fred Koerner, who had testimony that one, Freedi Edelman had committed suicide, the same Edelman Bertini testified to grand jury minutes, same Edelman eye witnesses described in their testimony for the government. Edelman suicide came immediately upon his learning of Bertini's co-operation with government.

37) Defendant neglected to place before the jury, one sintilla of testimony as to what price the government and society paid for Bertini's perjours testimony.

38) Defendant neglected to place before the court and/or jury one sintilla of evidence or testimony to contridict the government's interstate allegations.

39) Defendant failed to subpeona Mr. Joseph Vento, who had given plaintiff's investigator exculpatory statement, plaintiff requested this on numerious occassions.

40) Defendant neglected to request for a recess or differrment of the introduction of the stolen Swartz credit card testimony against plaintiff until the complete record could be subpeoned from the state court.

41) Defendant neglected to subpeona or have testify one, Timothy Ohrman, who had given investigator a statement under oath exculpating Plaintiff, for Ohrman was in prison with Bertini. Both Plaintiff and investigator informed Defendant of this exculpatory statement prior to trial. Ohrman was under State probation officer's control an easily accessable.

CONCLUSION

The Plaintiffs being grossly aggrieved by the sustained loss of their dearest of kin, have suffered irrepairable harm, both mentally and financially facing public embrassment via the exposure of the Television and newspapers news broadcatst, printing reports of the trial proceedings with the highly publizied conclusion and ultimate sentencing.

Wherefore Plaintiffs, seek punitive and pecuniary damages in the amount of Five Million Dollars ($5,000,000.) jointly and or severally as compensation for the aggreived loss(s) sustained by all.

Wherefore Plaintiffs, seek double and contingent damages sustained as a direct result from the expendature of funds and anxieties endured in the amount of Six Hundred Thousand Dollars ($ 6,000,000.oo) jointly and or severally as compensation for all.

Plaintiffs respectfully request this Honorable Court to direct the Defendant herein to answer the complaint in timely fashion, affording Plaintiff the opportunity to file interrogatories with an ammended complaint upon Plaintiff's receipt of Defendant's respective responses.

Plaintiff's respectfully request this Honorable Court to set a contigent trial date, whereas all parties will benefit by such advanced knowledge setting their respectives schedules accordingly.

MEMORANDUM OF LAW
IN SUPPORT OF COMPLAINT

The United States Supreme Court held in, Haines v Kerner 404 U.S. 519, at 521, a petitioner's pro se complaint cannot be dismissed unless it appears from the record and beyond doubt that plaintiff can prove no set of facts which would entitle him to the relief sought.

The United States Supreme Court held in, Adickers v Kress & Co. 398 U.S. 144, where there are issues of fact involved no summary judgement may be granted, and if granted shall be dismissed.

WHEREFORE Your Plaintiff Respectfully Requests That:

This Honorable Court direct the Defendant to respond in a reasonable time, should said Defendant fail to respond to grant Plaintiff judgement on the pleadings here to with, for the reasons and contentions here to with listed in the afore, Complaint in Negligence Action.

Respectfully Submitted,

_____

Francis Rick Ferri, Plaintiff pro se
Post Office Box 1000
Lewisburg, Pa. 17837

Sworn and Subcribed before me this 17th day of Feb., 1976

/S/ R.M. REISH United States Parole Officer

AFFIDAVIT

After first being duly sworn upon his oath according to law, Francis Rick Ferri, the Plaintiff in this Complaint in Negligence action, desposes and says that, he has read the attached documents labeled, "Complaint in Negligence Action", and swears said contents to be true to the best of his knowlegde, belief and information.

That he files this Complaint in Negligence Action fully believing that he and the Plaintiffs therein are entitled to the damages therein listed, that he is a pro se litigant unlearned in the law seeking just relief from this Honorable Court.

That he files this Complaint in Negligence Action in be-half of all the entitled Plaintiffs fully believing their support is not with-held, that is is acting as a pro se counsel for all the ligigants until counsel recognized by this court files a notice of apperance.

Francis Rick Ferri
Post Office Box 1000
Lewisburg, Pa. 17837

Sworn and Subcribed before me this 17th day of Feb., 1976.

/S/ R.M. REISH

United States Parole Officer

[Certificate of Service Omitted in Printing]

February 23, 1976

Clerk of Courts
Union County Courthouse
2nd & St. Louis Streets
Lewisburg, Pa. 17837

To Whom It May Concern:

Enclosed please find copy of law suit which was mailed to me by my ex-husband of eleven years.

I demand my name and the names of my three children be withdrawn as plaintiffs.

I was not asked by main plaintiff, Francis Rich Ferri to be a co-plaintiff and I do not wish to subject my three children to such an abhorrent action.

I would appreciate action taken immediately.

Respectfully yours,

Lorraine C. Ferri

Lynda M. Ferri, Child

Jeffrey L. Ferri, Child

Richard A. Ferri, Child

IN THE COURT OF COMMON PLEAS
FOR UNION COUNTY
COMMONWEALTH OF PENNSYLVANIA

FRANCIS RICK FERRI
United States Penitentiary
Lewisburg, Pa. 17837

and

CONSTANCE JEAN FERRI
R.D. #1
Boyers, Pa. 16020

and

LUIGI FERRI and
CONCETTA FERRI
535 Allegheny Avenue
Glassport, Pa. 15045

and

Related Parties, Whom
Vested Interests
May Appear,
Plaintiffs,

vs.

DANIEL ACKERMAN, ESQ.
27 North Main Street
Greensburg, Pa. 15601
Respondent.

Civil Action Law
Docket Number

No. 115 1976

PRELIMINARY OBJECTIONS—
FILED MARCH 25, 1976

Defendant files these Preliminary Objections to Plaintiff's Complaint in Negligence, all pursuant to Pa. R.C.P. No. 1017, each based upon the reasons indicated:

PETITION RAISING QUESTION IN VENUE

1. The Complaint, on its face, states that all of the facts out of which the cause of action arose occurred in either Westmoreland County or Allegheny County, and that all transactions or occurrences out of which the alleged cause of

action arose occurred in either Westmoreland County or Allegheny County.

2. Defendant is a lawyer who resides in Westmoreland County. His principal and only professional office is situated in Westmoreland County.

3. No facts are alleged in the Complaint linking Union County to this action in any way. Defendant was never even in Union County.

4. This suit was improperly instituted in Union County. Defendant was served with a copy of the Complaint by the Sheriff of Westmoreland County who was deputized by the Sheriff of Union County.

5. Other Preliminary Objections are raised in this pleading. However, if the Court of Common Pleas of Union County sees fit to sustain this Preliminary Objection raising the issue of venue and transfers the action to Westmoreland County, no further action on any of the other objections is requested.

WHEREFORE, Defendant requests the Court to transfer this action to the Court of Common Pleas of Westmoreland County, Pennsylvania.

PETITION RAISING QUESTION OF JURISDICTION

6. The Complaint, on its face, indicates that the criminal action which gave rise to facts involved in this alleged cause of action is presently on appeal. Questions involving ineffective assistance of counsel under the Sixth Amendment may be raised on direct appeal, and at a post-conviction hearing, or by other collateral attack. (Plaintiff Francis Ferri's criminal case is presently on appeal before the Court of Appeals for the Third Circuit at No. 75-1502.) Until the issue of ineffective assistance of counsel is pursued through procedures afforded by the criminal law process, this Court has no jursdiction in this civil action.

7. Defendant requests that the issues raised in these Preliminary Objections be decided on briefs without the necessity of oral argument.

WHEREFORE, Defendant requests that the Complaint be dismissed with prejudice.

DEMURRER

8. The Complaint fails to state a cause of action upon which the Court may grant relief.

9. Defendant was appointed under the Criminal Justice Act, 18 U.S.C.A. §3006A, et seq., to represent Plaintiff Francis Ferri, who was then indigent. In the capacity he acted, Defendant was and is immune from any civil liability, or from any other liability arising from his conduct of the defense of Francis Ferri.

10. Among other reasons, the Complaint fails to state a cause of action since all of the allegations relate simply to Defendant's judgment in the decisions and choices made in the defense of Plaintiff Francis Ferri, Plaintiff is bound by his defense counsel's judgment and the Complaint states no cause of action by questioning that judgment.

WHEREFORE, Defendant requests the Court to dismiss the Complaint with prejudice.

Respectfully submitted,

George E. Schumacher
Federal Public Defender
421 Seventh Ave., Pgh., Pa. 15219

Ned J. Nakles
1714 Lincoln Avenue, Latrobe, Pa. 15650
Attorneys for Defendant

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF WESTMORLAND } SS.

Before me, the undersigned authority, personally appeared defendant, Daniel Ackerman, who, being duly sworn according to law deposes and says that the facts set forth in the foregoing Preliminary Objections are true and correct to the best of his knowledge, information and belief.

S/DANIEL ACKERMAN

SWORN to and subscribed
before me this 24th day of
March, 1976.

Notary Public

ALMA L. STEINBACK
Notary Public,
Greensburg,
Westmoreland Co.
My Commission Expires
November 4, 1978

[Affidavit of Service Omitted in Printing]

IN THE COURT OF COMMON PLEAS
FOR UNION COUNTY
COMMONWEALTH OF PENNSYLVANIA

FRANCIS RICK FERRI, and CONSTANCE JEAN FERRI, and LUIGI FERRI, and Related Parties, whom Vested Interests May Appear, as *Plaintiffs*	Civil Action Law Docket Number No. 115–1976
–v–	
DANIEL ACKERMAN, ESQUIRE, as *Respondent*	Jury Trial Demanded

AMENDED COMPLAINT

Comes now, Francis Rick Ferri, Plaintiff pro se, filing an 'Amended Complaint' to the above entitled action/cause. Plaintiff amends his original complaint adding the infractions of, Malpractice and Breach of Contract to his original Complaint In Negligence by Daniel Ackerman, Esquire, Respondant, in the above entitled action/cause. Pursuant to the Pennsylvania Rules Of Civil Proceedure, for complaints in Torts and Assumpt Causes.

WHEREFORE Your Plaintiff Respectfully prays that;
This Honorable Court set forth a date for a trial by jury to adjudacate the issues in contention. That should Respondant fail to properly deny the issues of contention in Plaintiff's original and amended Complaint of Negligence, ... Malpractice and Breach Of Contract to grant a judgement on the pleadings.

Respectfully Submitted,

_____

Francis Ferri, Plaintiff pro se
P.O. Box 1000
Lewisburg, Pa. 17837

After first being duly sworn upon his oath, Francis Rick Ferri, Plaintiff pro se files these documents fully believing he is entitled to the relief sought. That he files these documents believing said contents to be true to the best of his ability, knowledge and information.

_____

Francis Rick Ferri, Plaintiff pro se

Sworn and Subscribed Before me This ____ Day of April, 1976

_____ _____

United States Parole Officer Stamp

[Certificate of Service Omitted in Printing]

PLAINTIFF'S TRAVERSE
IN THE COURT OF COMMON PLEAS,
WESTMORELAND COUNTY, PENNSYLVANIA

FRANCIS RICK FERRI,
&
CONSTANCE JEAN FERRI,
&
LUIGI FERRI, and
CONCETTA FERRI,
&
RELATED PARTIES,
Plaintiffs
–vs–
DANIEL A. ACKERMAN,
ESQUIRE,
Defendant

CIVIL ACTION LAW
2633 of 1976

COURT IN BANC
TRAVERSAL BRIEF OF PLAINTIFF—
FILED OCTOBER 18, 1976

PLAINTIFF'S TRAVERSE TO DEFENDANT'S "BRIEF FOR DEFENDANT"

Comes now, the Plaintiff, Francis Rick Ferri unschooled at law, and on behalf of all the Plaintiffs herein, respectfully urges the Court, to note that the main thrust of the Plaintiff's *Pro se Complaint*, is to the inexcusable neglect of the defendant, which may not be charged to the Plaintiff.

Plaintiff further wishes by stipulation herein, to narrow the issues upon which this complaint should be heard, to a specific failure of the defendant to exercise the normal and customary skill in the area, of competent counsel in behalf of a client, in a criminal prosecution. Please take note of *Exhibits 1* and *2*, attached.

Now therefore, the Plaintiff urges the Court to take

Judicial Notice, that the activities of the defendant prior to trial, is the substance of the present cause of action, Therefore, when the defendant failed to assert and protect, the vital and fundamental right of the Plaintiff, not to suffer a criminal prosecution, where the statute of limitations for that prosecution had expired,[1] he was then and there, in the opinion of the Plaintiff, guilty of Malpractice and Non-feasance.

In support of the Plaintiff's complaint, he makes *specific reference* to the Pa. Rules Of Civil Procedure, Articles 3391 and 3393, which provide for (non-discriminatory) Malpractice and Negligence Suits in the State Of Penna., specifically citing attorneys, and also the 1st, 5th, 7th, 6th, 9th and 10th Amendments Of The Constitution, to which Plaintiff is entitled under the "equal protection clause" of the 14th Amendment.

That when the defendant sought for (exhibit 3), obtained and accepted[2] the Plaintiff as his client, he did in fact then and there as a corallary thereto, enter a contractual agreement[3] to zealously guard and protect the interests of the Plaintiff. To provide him with full recourse to the Courts as the law allows a defendant therein, to avail himself thereof.

Wherefore, it is strongly urged, that when the defendant, (which was legally unknown to Plaintiff at that time), failed to protect the lawfull and Constitutional rights of the Plaintiff in so clearly and basic a step, which would have then and there precluded any prosecution whatsoever, the precluded omission thereof besmacks of deliberately evasion of duties, almost to the level of bringing about the possibility of being accused of having conspired with the prosecution to fraudulantly obtain a criminal conviction against the Plaintiff, perhaps in violation of Title 18, Section 241 and 242?

---

[1] Plaintiff filed an, unobjected to, amended complaint, asserting the right inject further acts of the defendant's Negligence, Malpractice, etc. as they became, known for Plaintiff's appellate counsel presented, for the first time, the limitations issued on appeal (No. 75–1502, 3 Cir Ct Of Appeals).

[2] The defendant enjoyed the dicrestionary option of accepting or declining the 'assignment' should same interfer with his active private practice. He accepted receiving $5,100.00 renumeration.

[3] Article 1, Section 10, U.S. Constitution, providing that Obligations of Contracts *shall not* be imparied. The defendant would now have this absolute Constitutional Right violated by the ruse of "absolute immunity".

Since any first year law student would have been alerted, based even though, upon sub-standard level of competance, to so glaring a right as to be protected from an inpermissable and invalid prosecution, thru no more effort than asserting that right.

The defendant would suggest, that he is cloaked with absolute immunity, as are the Legislators, Judges & Prosecutors. Plaintiff believes that, if at all, only a qualified immunity exists, and even that can only be raised as to *judgmental trial tactics and decisions*. When an attorney who under full fee and not on a voluntary self sacrificing service, commits or omits to a client, of normal attention to his interests, which thereby directly and solely causes the Plaintiff to be convicted of a criminal charge and placed in prison, he must be estopped, from denying liability, and from asserting the defense of absolute immunity for the injury done.

Assuredly, the Plaintiff may well have an "ineffective representation by counsel" (as raised by defendant), to be properly raised in a different forum, as an available remedy to pursue. Plaintiff expects to exercise that remedy. However, that issue is no excuse, nor a defense for the defendant, to support an assertion that Plaintiff must be limited, to only that recourse; which of course does not remedy the tort or injury done, in so far as being imprisoned is concerned, etc. That remedy at best, may only reverse the, and set aside, conviction of judgment.

The defendant would also have, what appears to be a balancing test made relating to his position as trial counsel, requiring absolute immunity, in order to protect the integrity of the Judicial Process and the availability of attorneys to serve indigent defendants.

However, even this balancing of interests must include the *trust of the public*[4] in accepting and being held responsible for the acts of one's attorney.

[4]Plaintiff would wish to share this thought with the Court; respectfully,

May the Court now be heard to properly say; that had it obtained the services of a neurosurgeon, to examine the Plaintiff, for physical competency to stand trial, and that neurosurgeon, using a testing needle, caused the Plaintiff to contract hepatitis and inadvertently slipping, struck the Plaintiff's eyeball, thus causing him blindness, thereby-is to be shielded by absolute immunity. No more than this instance, may the defendant be so absolutely shielded.

Needless to say, the final ingredient to this equation must be based upon some line of minimal standards of counsel, below which, responsibility must attach.

It is in this vein that Plaintiff respectfully, points out, if so gross a derelection of duty can be condoned, by the Judiciary then it will not be long, before the Courts shall be enundated with plain untrained citizens demanding their day in court, without being subject to such counsel, which is in form only, and which in fact meets the Mockery, Sham and Farce standards, which even now, is being at long last shredded from the scene.

While the right to proper and full advocacy in an adversarial proceeding before the bar, was and is the absolute right of the Plaintiff and which was injured by the Malpractice, etc. of defendant.

WHEREFORE, the Plaintiff respectfully prays the Court to grant him his day in Court, the right to pursue his Malpractice Suit against the defendant, for the otherwise unremedial injuries done to the Plaintiffs, as well as for the violence done to his Constitutional Rights, by the inexcusable conduct of the defendant.

Respectfully,

_____

Francis Rick Ferri, pro se
P.O. Box 1000
Lewisburg, Pa. 17837

Sworn & subscribed before me this 18th day of Oct., 1976.

_____ _____

United States Parole Officer Stamp

[Affidavit of Service Omitted in Printing]

TRAVERSAL BRIEF: EXHIBIT 1
SUPPLEMENTAL ARGUMENT

VIII. The court was without jurisdiction to prosecute, try and punish Ferri on the Seventh, Eighth and Ninth Counts because the Indictment was not found within the applicable period of limitation. Accordingly, Ferri's conviction on those counts must be vacated and the counts dismissed, and Ferri should be granted a new trial on the remaining counts of the Indictment because of resulting prejudice.

Standard of review: The district court erred in formulating and applying the legal precepts involved.

(a) Since the Seventh, Eighth and Ninth Counts of the Indictment allege violations of the internal revenue laws, the properly applicable period of limitation is the three year period specified by §6531 of the Internal Revenue Code, which period had elapsed before the Indictment was filed.

The seventh, eighth and ninth counts of the indictment describe alleged violations of the internal revenue laws, to wit, of §§5861 and 5871 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §5861 and §5871.

The period of limitation specified in 18 U.S.C. §3282 applies "except as otherwise expressly provided by law". Accordingly, the properly applicable period of limitation here is not the general five year period provided in 18 U.S.C. §3282, but the three year period of limitation made applicable by 26 U.S.C.

TRAVERSAL BRIEF: EXHIBIT 2
ISSUES PRESENTED

1. Whether the evidence was sufficient to support defendant's convictions on counts 1 and 2.

2. Whether there was plain error in the instructions.

3. Whether the court properly refused to allow defendant to plead guilty.

4. Whether defendant's right to a speedy trial was violated.

5. Whether the court committed plain error in allowing the jury to determine if defendant was guilty of the offense of making a destructive device (Count 9) and the offense of possession of an unregistered and illegally made destructive device (Counts 7 and 8).

6. Whether prejudicial error occurred during the testimony of government witnesses Richardson and Sammis.

7. Whether the trial court properly permitted a single trial of defendant with codefendants Matthews and Laverich.

8. Whether defendant waived the defense of the statute of limitations.

STATUTES INVOLVED

18 U.S.C. 844(i) provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty

TRAVERSAL BRIEF: EXHIBIT 3

APPENDIX

INTERNAL OPERATING PROCEDURES

The Board of Juges, though satisfied with the existing approved panel of attorneys available for appointment pursuant to the Criminal Justice Act of 1964, as amended, and the Local Plan, recognizes that criminal cases in the Western District of Pennsylvania will grow in number and complexity. Moreover, that growth will emphasize the importance of the Rule 50(b) Plan for prompt disposition of criminal cases. Finally, the state of the economy of this country might result in larger numbers of persons eligible for and requiring appointed counsel. To the end that indigents shall continue to receive the effective and timely assistance of counsel without undue cost to the Government, these procedures shall become effective upon the appointment of the Federal Public Defender for the Western District of Pennsylvania:

a. Two panels of approved attorneys shall be established, Panel A and Panel B. Panel A shall consist of those attorneys regularly practicing in the Court who have demonstrated their professional integrity, interest, training, ability, and experience in criminal practice and in representing the legally indigent. Panel B shall consist of those attorneys who have asserted an interest in criminal practice and in representing the legally indigent, but whose training, ability, and experience in criminal practice have not been demonstrated and established.

b. An attorney who desires to be listed in an approved panel of attorneys shall apply to the Federal Public Defender and shall have his background and qualifications evaluated by the Federal Public Defender who shall then make a recommendation to the Court and the Magistrates. The Court shall then assign the attorney to the appropriate Panel.

   An attorney in Panel B may, at his request or at the request of the Court, a Magistrate, a local bar association, or the Federal Public Defender, have his background and qualifications evaluated by the Federal Public Defender who shall then recommend whether the attorney may be transferred by the Court to Panel A or should be removed from the approved Panel.

c. Those attorneys listed on the existing panel of approved attorneys shall continue thereon and shall be considered as members of Panel A. An attorney in Panel A may, at his request or at the request of the Court, a Magistrate, a local bar association, or the Federal Public Defender, have his background and qualifications evaluated by the Federal Public Defender who shall recommend whether the attorney should be transferred by the Court to Panel B or removed from any approved Panel.

d. The Federal Public Defender shall make his office available to counsel and advise any private attorney appointed to represent an indigent. Legal research, briefs and memoranda on file in the office of the Federal Public Defender shall be shared with such appointed attorneys as might be ap-

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75–1502

UNITED STATES OF AMERICA

v.

FRANCIS D. FERRI a/k/a Rick
JOSEPH LAVERICH
KENNETH R. MATTHEWS

FRANCIS D. FERRI, a/k.a "RICK"
Appellant

(D.C. Crim. No. 74–277)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued October 8, 1976

Before VAN DUSEN and ROSENN, *Circuit Judges*, and CAHN, *District Judge*

LEON H. KLINE, ESQ.,
Philadelphia, Pa.
Attorney for Appellant

BLAIR A. GRIFFITH, U.S.
Attorney, Pittsburgh, Pa.;
SIDNEY M. GLAZER, ESQ. &
HOWARD WEINTEAUB, ESQ.,
Attorneys, Department of
Justice, Washington, D.C.;
THOMAS A. CRAWFORD, ESQ.,
Special Attorney, Pittsburgh
Strike Force;
Attorneys for Appellee

JUDGMENT ORDER—FILED NOVEMBER 3, 1976

After considering the issues raised by appellant, to wit:

(1) whether the evidence was sufficient to establish jurisdiction;[1]

(2) whether instructions to the jury were prejudicially erroneous;[2]

(3) whether the defendant's offer to plead guilty was properly denied;[3]

(4) whether there was undue delay of prosecution, in violation of the constitutional and regulatory rights of the defendant;[4]

(5) whether multiple offenses were properly submitted to the jury and multiple punishments imposed;[5]

(6) whether irrelevant and unfairly prejudicial testimony was properly received in evidence;[6]

(7) whether there was misjoinder and prejudicial joinder of defendants;[7]

(8) whether counts of the indictment alleging offenses arising under the internal revenue laws were barred by the applicable statute of limitations, and whether a new trial should be granted because of jury deliberation on those matters;[8]

---

[1] See *United States v. Ferri, Matthews, Appellant*, Opinion of 3/3/76 at ¶(3) of note 2 (3d Cir., No. 75–1459). 18 U.S.C. § 844(i) provides:

"Whoever maliciously damages . . . by means of an explosive, any . . . *vehicle . . . used in . . . any activity affecting interstate* or foreign commerce shall be . . . [guilty of a crime]." (Emphasis supplied.)

[2] See note 1 and N.T. 1937–38, 1954–55.

[3] F.R. Crim. P. 11; *Paradiso v. United States*, 482 F.2d 409, 413 (3d Cir. 1973); see also *United States v. Nathan*, 476 F.2d 456, 459 (2d Cir. 1973).

[4] *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Ferri*, Crim. No. 74–277 (W.D. Pa. 1974), reproduced at 24a.

[5] *United States v. Ponder*, 522 F.2d 941, 943 (4th Cir. 1975).

[6] *United States v. Stirone*, 262 F.2d 571, 576 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960).

[7] *United States v. Ferri* (Matthews, Appellant), No. 75–1459 (3d Cir. 1976), cited in note 1 above; *United States v. Armocida*, 515 F.2d 29, 46 (3d Cir. 1975).

[8] *United States v. Kenner*, 354 F.2d 780, 785 (2d Cir. 1966); *Askins v. United States*, 251 F.2d 909, 913 (D.C. Cir. 1958); see also *United States v. Waldin*, 253 F.2d 551, 558–59 (3d Cir. 1958). In *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917), the Supreme Court said, "[t]he statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases. . . ."

it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:

/S/ VAN DUSEN
Circuit Judge

Dated: NOV 3 1976

Attest:

Thomas F. Quinn, Clerk

**IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW**

FRANCIS RICK FERRI, *Plaintiff*	No. 2633 of 1976
vs.	Before: The Court en Banc on Briefs
DANIEL ACKERMAN, *Defendant*	Sitting en Banc

OPINION AND DECREE—FILED JANUARY 31, 1977

sustaining preliminary objections in the nature of a demurrer and dismissing the original complaint as amended

BY THE COURT EN BANC:

(Opinion by McCormick, J.)

The issue presented in this case is whether a lawyer appointed under the Criminal Justice Act to represent an indigent defendant in a federal criminal case is immune from civil liability at the suit of his own client.

Plaintiff filed this case originally in Union County at Civil Action Docket No. 115, 1976. Defendant objected to the venue and President Judge A. Thomas Wilson of Union County transferred the case to Westmoreland County under Pa. R.C.P. No. 1006 (6).

Plaintiff's *pro se* Complaint seeks monetary damages against defendant, an attorney who represented him in an extended criminal trial. The following facts appear from the Complaint.

Plaintiff was indicted in Federal Court. He was indigent, and the Court appointed defendant to represent him under the Criminal Justice Act, 18 U.S.C. §3006A, et seq. The Complaint generally alleges malpractice on the part of defendant in his capacity as plaintiff's lawyer in the criminal case. It itemizes dozens of alleged incidents, at the jury trial and before, all relating to the management of the criminal defense and the refusal of the defendant to follow plaintiff's instructions.

Defendant filed Preliminary Objections which are presently before the Court en Banc, including a Demurrer and a Petition Raising Questions of Jurisdiction; the same Preliminary Objections were filed to an Amended Complaint which alleged "malpractice and breach of contract."

Defendant makes the following arguments:

1. As a lawyer appointed to represent an indigent in Federal Court, he is immune from civil liability.
2. The Complaint fails to state a cause of action where all of the allegations relate to matters involving the exercise of judgment by a criminal defense lawyer.
3. A state court has no jurisdiction in an action based on ineffective assistance of counsel in Federal Court where that issue could be raised on direct appeal in the criminal case, at post conviction hearing, and by other collateral attack.

Plaintiff argues that defendant is not entitled to immunity, and that his malpractice action should not be dismissed.

Two cases have already considered the same immunity issue raised here and have concluded that a criminal defense lawyer appointed under the Criminal Justice Act enjoys immunity from civil liability. *Sullens v. Carrol*, 446 F. 2d 1392 (5th Cir. 1971); *Jones v. Warlick*, 364 F. 2d 828 (4th Cir. 1966).

Moreover, Public Defenders in Pennsylvania are immune from liability both under state law *(Reese v. Danforth*, Lancaster County, 131 June Term, 1975, affirmed p.c. 460 A. 2d 629) and under federal law *(Brown v. Joseph*, 463 F. 2d 1046 [3d Cir. 1972]).

In *Waits v. McGowan*, 516 F. 2d 203 (3d Cir. 1975) the Third Circuit held that a New Jersey public defender was immune from civil liability. In *John v. Hurt*, 389 F. 2d 786, 788 (7th Cir. 1973), a public defender was likewise held immune from liability in an action by the criminal defendant he represented. The court there held that even if defendant were so incompetent as to deprive his client of Sixth Amendment rights:

> ". . . we think that, as a matter of law, defendant is immune from liability for damages, and plaintiff's complaint must fail."

We conclude that the case law and strong public policy requires that defendant, as a lawyer appointed to represent an indigent defendant in Federal Court, must be immune from liability for damages.

The cases express a variety of reasons to support the doctrine of immunity. *Brown v. Joseph*, supra, concluded that if defense counsel were subjected to liability, sensitive and thoughtful members of the bar would hesitate taking positions as defenders, and experienced defenders might reconsider their positions. The potential imposition of civil liability would discourage lawyers from accepting appointments to represent criminal defendants. Fewer lawyers accepting criminal cases would be harmful to the judicial system. The ABA Standards, *The Defense Function* (Approved Draft 1971) p. 187, states:

> "Wide participation in the defense of criminal cases is important to the health of the administration of criminal justice and to the fulfillment of the bar's obligation to insure the availability of qualified counsel to every accused."

Even after an appointment is accepted in the defense of a criminal case, the possibility of civil liability would have a "chilling effect" on defense counsel, inhibiting the vigorous defense his client deserves. He would be required to measure every word in terms of his own personal liability. See *Ehn v. Price*, 372 F. Supp. 151, 153 (N.D. Ill. E.D. 1974); *Brown v. Joseph*, supra, 463 F. 2d 1046, 1048-1049 (3d Cir. 1972). Judge Learned Hand spoke of the "constant dread of retaliation" to justify prosecutorial immunity in *Gregiore v. Biddle*, 177 F. 2d 579, 581 (2nd Cir. 1949).

The United States Supreme Court recently held a state prosecutor immune even where he used false testimony and withheld exculpatory information. *Imbler v. Pachtmen*, 47 L. Ed. 2d 128, 141 (1976). The Supreme Court stated that the accurate determination of guilt or innocence:

> ". . . requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of the evidence."

The judge and the prosecutor are immune from liability. The defense counsel must also be immune. ABA Standards, *The Defense Function* (Approved Draft, 1971), 1.1 (a), sets out the position of the defense lawyer:

> "Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused."

Because we have concluded that defendant is immune from civil liability, his Preliminary Objection in the nature of a Demurrer is sustained, and the Complaint will be dismissed. With this disposition, there is no need to consider the other issues in the case.

ORDER OF COURT

AND NOW, to wit: the 31st day of January, 1977, after due and careful consideration of the pleadings and briefs presented in this matter, it is hereby ORDERED, ADJUDGED and DECREED that Defendant's Preliminary Objections in the nature of a Demurrer are hereby sustained, and the Original Complaint as amended is dismissed.

BY THE COURT:

s/RICHARD E. MCCORMICK
Judge

CONCURRING:

s/DAVID H. WEISS
President Judge

s/L. ALEXANDER SCULCO
Judge

Attest:

_____

Prothonotary

No. 1439/1977

FRANCIS RICK FERRI,
Appellant

v.

DANIEL ACKERMAN

In the Superior Court of Pennsylvania

No. 676 April Term, 1977

Appeal from the Order of the Court of Common Pleas, Civil Action-Law, of Westmoreland county, at No. 2633 of 1976.

PER CURIAM: FILED: FEB 15 1978

Order affirmed.

SUPERIOR COURT OF PENNSYLVANIA
Sitting at Pittsburgh

FRANCIS RICK FERRI,
Appellant

v.

DANIEL ACKERMAN

No. 676. April Term, 1977

ORDER

AND NOW, this 15th day of February, 1978, it is ordered as follows:

X Order Affirmed.

_____ Order Reversed.

_____ Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order Modified as set forth in opinion filed herewith.

_____ Ordered as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa. R. A. P.

_____ Costs to be taxed as provided in opinion filed herewith.

BY THE COURT

_____

Irma T. Gardner
Deputy Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing order was entered on the docket on the date set forth above.

Order entered:_____.

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

FRANCIS RICK FERRI,
Appellant

v.

DANIEL ACKERMAN,
Apellee

No. 98 March Term 1978

Appeal from the Order of the Superior Court of Pennsylvania at No. 676 April Term, 1977, affirming the order of the Court of Common Pleas, Westmoreland County, Sitting en banc at No. 2633 of 1976.

OPINION—FILED: NOV 18, 1978

NIX, J.

This is an appeal from an order of the Superior Court affirming an order of the Westmoreland County Court of Common Pleas sitting *en banc* which had sustained appellee's preliminary objections in the nature of a demurrer and dismissed the complaint.[1] Appellant filed this case originally in Union County, and after an objection to venue was interposed by the appellee the matter was transferred to Westmoreland County under Pa. R. C. P. 1006 (e). Appellant's complaint pursuant to the Criminal Justice Act, 18 U.S.C. § 3006 a (1978), to represent appellant in a criminal prosecution in the federal district court. In that trial, appellant was convicted by a jury and received a sentence of thirty years. In the complaint filed in the malpractice action appellant set forth numerous acts of omission during the pre-trial, trial and post-trial periods of representation.

The question presented in this appeal is whether a lawyer appointed under the Federal Criminal Justice Act, 18 U.S.C. §3006(a) (1978), to represent an indigent defendant in a federal criminal case is immune from tort liability based upon

[1] Jurisdiction for this appeal is based on section 204(a) of the Appellate Court Jurisdiction Act, July 31, 1970, P.L. 673, No. 223, art. II, §204(a), 17 P.S.

the alleged failure on the part of that attorney to raise the statute of limitations which allegedly would have barred prosecution for some of the ancillary counts of the indictments.[1] Appellant argues that any immunity that may be enjoyed by one standing in the position of appellee does not insulate against liability for gross negligence. He further argues that the assertion of a plea in bar based upon the expiration of the statute of limitation does not entail the type of exercise of judgment which requires immunization. Thus we must determine whether there is an immunity that protects appellee in this situation and the extent of that protection, if it exists.

Since we are here concerned with an asserted immunity protecting a participant in a federal legal proceeding, we are required to look to the federal law to determine whether it exists and if it does, its nature and scope. *Howard v. Lyons*, 360 U.S. 593 (1959). *See also Carter v. Carlson*, 447 F.2d 358, 361-62 n.5 (D.C. Cir. 1971); *Chandler v. O'Bryan*, 445 F.2d 1045, 1055 (10th Cir. 1971); *Garner v. Rathburn*, 346 F.2d 55, 56 (10th Cir. 1965). As noted by the United States Supreme Court in *Howard v. Lyons, supra*, the very nature of a ruling of privilege requires reference to the law of the sovereign creating it for a determination of its nature and scope.

> "The authority of a federal officer to act derives from federal sources, and the rule which recognizes a privilege under appropriate circumstances as to statements made in the course of duty is one designed to promote the effective functioning of the Federal Government. No subject could be one of

[1] Although the complaint set forth numerous instances in which it charged malpractice appellant has confined his complaint in this appeal to the failure to plead the statute of limitations. Appellee charges that this issue was not properly pleaded and thus should not be considered. It is quite true that in the initial complaint this allegation was not made. Appellant filed a second pleading entitled, "An Amended Complaint" which also failed to set forth the charge. However, appellant subsequently filed what he termed a, "Traversal Brief of Plaintiff" wherein the question of failure to plead the statute of limitations was specifically raised. In view of the fact that these pleadings were filed without the benefit of counsel and the question was clearly raised in the court below, we decline to dispose of the issue based upon this procedural irregularity. *See* Haines v. Kerner, 404 U.S. 519, 520 (1972). *See also* Note, *the United States Courts of Appeals: 1976-77 Term Criminal Law and Procedure*, 66 George. L. J. 203, 488 n. 1565 (1977).

more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States. *Cf. Clearfield Trust Co. v. United States*, 318 U.S. 363, 87 L.ed 838, 63 S. Ct. 573. We hold that the validity of petitioner's claim of absolute privilege must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress." *Id.* at 597.

The doctrine of common law judicial immunity was first adopted by the United States Supreme Court in the cases of *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1886), and *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). In *Randall, supra*, an action was brought by a plaintiff who was formerly a member of the bar of the Commonwealth of Massachusetts against one of the judges of the court of that State for an alleged wrongful removal of his name from the rolls of attorneys eligible to practice in that jurisdiction. In holding that an entry of judgment in favor of the defendant in that case was proper, the United States Supreme Court stated:

"Now, it is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jursidction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly. This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of the judicial authority and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or property. And uninfluenced by such considerations they cannot be, if, whenever they err in judgment as to their jurisdiction, upon the nature and extent of which they are constantly required to pass, they may be subjected to prosecution at the instance of every party imagining himself aggrieved, and called upon in a civil action in another tribunal, and perhaps before an inferior judge, to vindicate their acts.

This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it has been maintained by a uniform course of decisions in England for centuries, and in this country ever since its settlement."

Id. at 535-36

The Court further observed:

"In the United States, judicial power is vested exclusively in the courts. The judges administer justice therein for the people, and are responsible to the people alone for the manner in which they perform their duties. If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called upon to account by impeachment, and removed from office. In some States, and Massachusetts is one of them, they may be removed upon the address of both houses of the legislature. But responsible they are not to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly."

Id. at 537.

It is significant that in *Randall*, the Court was concerned with the privilege surrounding the acts of a state jurist in a state proceeding. It is apparent that at that point in the development of the doctrine the Court did not perceive a difference between the federal privilege and the immunity afforded by the states to its judges. The absolute immunity announced for judicial officers was then perceived by the Court as a universally accepted concept in both the state and federal systems.

Four years after *Brigham*, in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872), a case involving a justice of the Supreme Court of the District of Columbia, Justice Field employed virtually the same theory as being applicable to a federal judicial officer.

"[The complaint here established] that the order for the entry of which the suit is brought, was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however er-

roneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would estroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, 'a deep root in the common law.'

Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the Subject of Judicial inquiry."

Id. (footnotes omitted)

The doctrine of common law judicial immunity has continued to be embraced in the federal system to the present day. See *O'Bryan v. Chandler*, 496 F. 2d 403 (10th Cir. 1974); *Garfield v. Palmieri*, 297 F. 2d 526, 527 (2nd Cir. 1962); *Meredith v. Van Oosterhout*, 286 F.2d 216, 221-22 (8th Cir. 1960). The protection afforded is absolute and comprehensive as to all acts allegedly performed within the scope of the judge's official duties.

The common law also recognized a need to extend this protection to other participants in judicial proceedings. One of the first American decisions to recognize an immunity for a prosecutor was *Griffith v. Slinkard*, 146 Ind. 117, 44 NE 1001 (1896). In that case a suit in damages charged that the prosecutor maliciously and without probable cause added plaintiff's name to a grand jury true bill after the grand

jurors had refused to indict him. As a result of the prosecutor's actions plaintiff was arrested and forced to appear in court on several occasions before the charge finally was nolle prossed. The Supreme Court of Indiana dismissed the damage suit on the ground that the prosecutor was absolutely immune. The *Griffith* rule was followed by a clear majority of the states. *Smith v. Parman*, 101 Kan. 115, 165 P 663 (1917); *Semmes v. Collins*, 120 Miss. 265, 82 So. 145 (1919); *Kittler v. Kelsch*, 56 N.D. 227, 216 N.W. 898 (1927); *Watts v. Gerking*, 111 Ore. 655, 228 P. 135 (1924) (on rehearing). The principle was embraced in the federal system in 1926. *Yaselli v. Goff*, 12 F.2e 393 (1926). In *Yaselli*, plaintiff sought damages alleging that a Special Assistant to the Attorney General of the United States maliciously and without probable cause procured an indictment against him by introducing false and misleading evidence. The *Yaselli* Court held, "[t]he immunity is absolute, and is grounded on principles of public policy" *Id.* at 406. In discussing the development of the common-law immunity of a prosecutor the United States Supreme Court, after recognizing the authority of *Yaselli*, *supra*, stated:

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."
>
> *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976)[2]

Our research has located two federal cases discussing the immunity of federally-appointed criminal defense attorneys.

---

[2] We note that some of the language in *Imbler* has been interpreted as leaving open the question as to whether the prosecutor enjoys an absolute privilege when he is acting in the role of an administrator or investigative officer. *See e.g.* Briggs v. Goodwin, 569 f.2d (10th Cir. 1977). The legitimacy of this distinction in this inquiry is questionable since the language relied upon in *Imbler* was in a discussion of the applicability of the common-law rule of immunity under §1983 (42 U.S.C.S. §1983). See n. 3, infra. This question need not detain us here since the challenged conduct related to counsel's advocacy in the judicial processing. Thus, even if we were to accept the legitimacy of this qualification as being applicable to common-law immunity, the qualification would not be appropriate under the facts of the instant case.

Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971); *Jones v. Warlick*, 364 F.2d 828 (4th Cir. 1966). The decision in *Jones*, *supra*, was a per curiam opinion affirming a summary judgment in favor of the federal defense attorney. The Fourth Circuit in *Jones* based its decision, *inter alia*, upon the reasoning expressed in *Bradley v. Fisher*, *supra*, and *Yaselli v. Goff*, *supra*. In *Sullens v. Carroll*, 446 F.2d 1392 (5th Cir. 1971), the Court of Appeals for the Fifth Circuit held that court appointed attorneys are immune from civil liability. *Sullens* relied on *Jones v. Warlick*, *supra*.

Sullens and *Jones* are the only cases out of the federal courts of appeals which concern the immunity of federal appointed defense attorneys with reference to their representation in a federal proceeding.[3] We are provided with further guidance on this issue by the recent holding of the United States Supreme Court in *Butz v. Economou*, 46 L.W. 4952 (June 29, 1979), which held some federal executive officials were entitled only to qualified immunity, but that federal agency attorneys presenting actions were absolutely immune from civil liability. The Court made the following observations concerning participants in the judicial process:

> "The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the *Bradley* Court suggested, 13 Wall. (80 U.S.), at 348-349, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. *See Pierson v. Ray*, *supra*, at 554. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."
>
> *Butz. v. Economou*, 42 L.W. 4952, 4961 (June 29, 1978)

It is therefore apparent that an absolute and comprehensive immunity surrounded appellee in the handling of appellant's trial. The qualifications appellant would have us

[3] We need not here consider the applicability of the common-law immunity in damage actions against state officials under the Civil Rights Act of 1871, now Section 1983 of Title 42 of the United States Code. *See generally*, Weissman, *The Discriminatory Application of Penal Laws by State Judicial and Quasi-Judicial Officers: Playing the Shell Game of Rights and Remedies*, 69 N.W. L. Rev. 489, 528–36 (1974).

engraft upon the immunity have not been recognized by the federal courts in their application of the doctrine. We are therefore satisfied that the dismissal of appellant's complaint was appropriate.

The order of the Superior Court affirming the order of the trial court *en banc*, sustaining the demurrer and dismissing the complaint is hereby affirmed.

Mr. Justice MANDERINO concurs in the result.

Mr. Justice ROBERTS filed a dissenting opinion in which Mr. Justice LARSEN joins.

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

FRANCIS RICK FERRI, *Appellant* v. DANIEL ACKERMAN	No. 98 March Term, 1978 Appeal from the Order of the Superior Court of Pennsylvania at No. 676 April Term, 1977, affirming the Order of the Court of Common Pleas, Westmoreland County, Sitting en Banc at No. 2633 of 1976.

DISSENTING OPINION—FILED: NOVEMBER 18, 1978

ROBERTS, J.

The majority holds that private counsel appointed to represent an indigent defendant in a federal criminal case enjoys the same immunity as a federal official carrying out his official duties. The only cases cited in support of this conclusion, however, fail to provide any analysis justifying this extension of federal immunity.

In describing the rationale underlying the doctrine of official immunity, the United States Supreme Court in *Butz v. Economou*, ___U.S. ___, ___ S. Ct.___, 46 L.W. 4952 (1978), emphasized:

> "[T]he injustice, particularly in the absence of good faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion; [and] the danger that the threat of such liability would deter his willingness to execute his office with the deciveness and the judgment required by the public good."

Id. at 4957 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 240, 94 S. Ct. 1683, 1688 (1974). Neither rationale applies to private appointed counsel. An appointed counsel does not need any more discretion, freedom, or encouragement to exercise his professional judgment and skill than does privately retained counsel.

Further, under federal law, defense attorneys who participate in trials in state courts are not thereby acting under color of state law for purposes of 42 U.S.C. §1983. See, e.g., *Thomas v. Howard*, 455 F.2d 228, 229 (3d Cir. 1972) (appointed counsel was "performing his duties solely for appellant, to whom he owed the absolute duty of loyalty, as if he were a privately retained attorney"). I would interpret federal immunity law in this light and would hold that attorneys appointed to represent defendants in federal court do not, merely by that representation or appointment, acquire status as a federal official entitled to immunity.

Finally, the majority's result raises a serious equal protection issue. Those who cannot afford private counsel are denied a remedy for inadequate representation which is apparently available to those who can afford privately retained counsel. Furthermore, the denial of such a remedy must be viewed as establishing a lower standard of care for appointed counsel.

I would, therefore, reverse the order of the Superior Court.

Mr. Justice Larsen joins in this dissenting opinion.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

FRANCIS RICK FERRI,
Appellant

v.

DANIEL ACKERMAN

No. 98 MARCH TERM, 1978

JUDGEMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the Superior Court, be, and the same is hereby affirmed.

BY THE COURT:

Sally Mrvos, Esquire
Prothonotary

Dated: November 27, 1978

Supreme Court of the United States

No. 78-5981

FRANCIS RICK FERRI,

Petitioner,

v.

DANIEL ACKERMAN

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of Pennsylvania, Western District.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for write of certiorari be, and the same is hereby, granted.

February 21, 1979